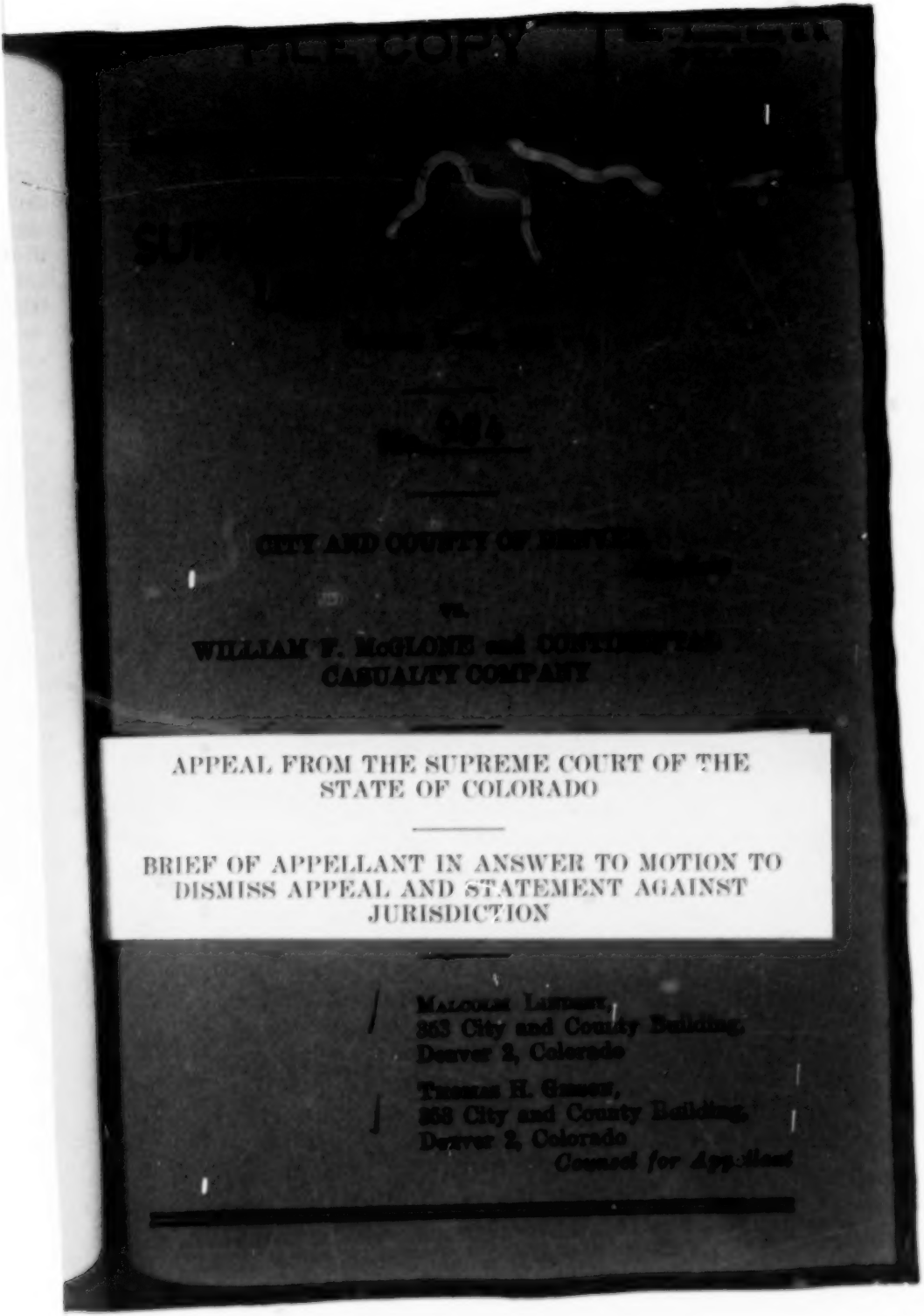

No. 944

CITY AND COUNTY OF DENVER,

vs.

WILLIAM T. McCLONE and CONTINENTAL CASUALTY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLANT IN ANSWER TO MOTION TO DISMISS APPEAL AND STATEMENT AGAINST JURISDICTION

Malcolm Lassen,
353 City and County Building,
Denver 2, Colorado

Thomas H. Gamon,
353 City and County Building,
Denver 2, Colorado
Counsel for Appellant

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No. 15343

IN THE

Supreme Court

OF THE

State of Colorado

WILLIAM F. McGLONE and CONTINENTIAL CASUALTY COMPANY, a Corporation,
Plaintiffs in Error

vs.

CITY AND COUNTY OF DENVER, a Municipal Corporation,
Defendant in Error

Error to the County Court of the County of Arapahoe

Honorable Henry Bruce Teller Judge

BRIEF OF DEFENDANT IN ERROR-APPELLANT IN ANSWER TO MOTION TO DISMISS APPEAL AND STATEMENT AGAINST JURISDICTION

PRELIMINARY STATEMENT

We find ourselves confronted with the Motion to Dismiss that is accompanied by a "Statement of the Case" and "Argument," which we respectfully submit consists of a conglomorate of gratuitous assumptions and misleading assertions respecting the issues of law and fact shown by the record herein, and which, when placed beside admissions that are contained therein, show either an intentional or unintentional presentation of the so-called "command or direction" or authority which was pleaded by McGlone and the Company "on information and belief" to have been an *arrangement* by the Board of Water Commissioners with Kountze Brothers Banking House for it to act as "Fiscal Agent" for the *pay-*

ment of bond interest coupons that they pleaded as their defense, instead of devoting their attention to a frank consideration of the propositions which we have presented for consideration on the questions of jurisdiction, to wit: that the decision of this case was based and made to turn upon a so-called ORDER of said Board, which the Supreme Court of Colorado held to be a CONTRACT that was never in any manner pleaded or placed in issue; which to exist at all would of necessity have to be an act legislative in character; which was first announced and decided to be such an order or contract by said Court, and the validity of which was thereupon, in apt time, drawn in question by the City on the ground of its being repugnant to the Constitution of the United States, by petition for rehearing, which was denied.

For these reasons it becomes necessary that we should first call especial attention to, and answer in detail, the contents of the "Statement of the Case" before proceeding to answer the propositions stated in the Motion to Dismiss, as they are presented for argument.

SUMMARY OF ARGUMENT

This is a civil action that was instituted by the City and County of Denver in the District Court of the City and County of Denver, State of Colorado, upon a bond in the penal sum of $500,000.00 that was executed to it by the Plaintiffs in Error (Appellees), who were the defendants in said trial court.

Said bond was the general official bond of said McGlone, as Manager of Revenue, Ex-officio Treasurer of said City and County, and the complaint in said cause alleged the breach thereof in that McGlone had converted and failed to account for or turn over to his successor $25,997.50 of the City's moneys that were in his hands as such Treasurer.

Said bond was executed in litteral compliance with Section 105 of the City's Charter which provides that such bonds shall be conditioned as follows:

> " * * * for paying over to his succesor in office all such sums of money belonging to the City and County

as shall be in his hands, and to account for and turn over to his successor all moneys deposited with him for any cause whatsoever."

In their answers the defendants in said trial court admitted that said McGlone had deposited moneys of the City in Kountze Brothers Banking House in New York City in the aggregate of the amount asked for by the City in its complaint, and that he was unable to return them because of the failure of said bank, but denied liability, and alleged as their defenses:

1. "That liability, if any, was upon McGlone's *special* bond given as Treasurer of the Board of Water Commissioners, and not upon the bond sued upon in this case, given by him as County Treasurer"; and
2. "That he sent the Board's funds, lost in this case, to Kountze Brothers upon the direction and command of the Board, his superiors, who had the exclusive control and jurisdiction over such funds."

Said Board is a mere administrative agency of said City and County that owns no funds and all monies of the City that are collected by it for water service are required to be daily turned over to the Treasurer of said City and County, upon whom the charter of the City casts the burden of exclusive responsibility for the receipt, control, safe keeping and disbursement of all the City's moneys, and, in particular all moneys that are received by him from the Water Board to be placed in a bonded indebtedness interest fund and a sinking fund which are required to be kept and used only in the payment of interest and in the purchase, payment and redemption of the bonded indebtedness of the City and County.

Said Treasurer is mandatorily required by the Charter to pay such interest and bonds without even warrants of the Board or audit by the Auditor.

There is no such thing as a special bond required of, nor was any such bond ever executed by, the Treasurer to said Board or anyone else. The charter authorizes the Board to require and mandatorily requires the Treasurer to execute an ADDITIONAL bond to the City and County; and the first of the defenses above mentioned was not only abandoned by

the Plaintiffs in Error (appellees), but in its opinion herein the Supreme Court of Colorado designated the bond referred to in said first defense as a supplemental bond.

The only evidence that was offered to support the alleged "direction and command" contained in said second defense consisted of the letters to which said opinion refers, two of which are set forth by copy therein, and to the other of which said opinion refers as "containing the contract arrangements already described", and that is to say, the contract that said opinion construed said letters to be, and to have been entered into by said Water Board in behalf of both the City and McGlone, binding them to deposit the city's moneys in said Kountze Brothers Bank, contrary to the many provisions of the City's Charter. (See Appendix to "Statement as to Jurisdicion" Exhibit C).

Said letters do not even purport to be a "direction or command" given or made by said Water Board to anyone, and were all written long before McGlone was inducted into office as Treasurer, were not addressed to him, and no evidence was offered to prove that said Board authorized them in the manner required by the charter for the enactment of any orders it may lawfully enact.

Notwithstanding said Board is a mere administrative agency that derives its sole authority from Section 297B of the City Charter, 1927 Edition (Exhibit C, Appendix to Statement as to Jurisdiction) and that section provides that "all action by the Board shall be taken by a majority of the Board and not otherwise", and that the Auditor "shall countersign and register all contracts", in its decision of this case, the Supreme Court of Colorado ruled and decided that said letters were an ORDER of said Board that constituted a CONTRACT entered into by it with Kountze Brothers Banking House whereby both the City and McGlone were bound to deposit said moneys in that Bank in New York City contrary to the provisions of Section 106 of the City's Charter which requires that the City's moneys shall be deposited in Denver banks that pay the highest interest and will give depository bonds for the security of the City and County, executed by sureties other than the surety on the Treasurer's bond.

Ever since the question was first raised in the Colorado Supreme Court the "rule of strict accountability" has been

applied by that Court, following that rule as it is stated in U. S. vs. Prescott, 3 How. 578, and the opinion in the instant case says that "applying the rule of strict accountability" • • • the Court is of the opinion" that said pretended ORDER or contract constituted an exception thereto.

Said opinion is based and made to turn upon the proposition that said McGlone was absolved from liability by reason of said pretended order or contract alone. That was an issue that was in no manner presented for decision, and the statement of facts shown on the face of said opinion is the opposite of the facts actually shown on the face of the record.

By so construing and applying said letters as being such an order or contract the bond contract sued upon was abrogated and said appellees were discharged of all liability on account of McGlone's breach thereof as alleged in the complaint.

Wherefore, because the sole issue that was presented for decision was whether the appellees were liable for the breach of said bond contract the failure to perform the condition of which they admitted, necessarily the case could not be decided without a consideration and construction of both said bond contract and the so-called "command or direction" that was the only defense upon which appellees relied for exhoneration; and said ruling necessarily abrogated said McGlone's official bond contract and, in so doing, constituted a decision in favor of the validity of the pretended ORDER or CONTRACT which said letters were so construed and held to be, and which necessarily had to be an act legislative in character to be such an order or contract entered into by said Board for the City and McGlone at all, had there been the semblance of authority on its part to enter into such a contract.

The consequence is that a Federal Constituitonal question appears on the face of said opinion itself and was not required to be specially set up in that Court to entitle the City to an appeal as a matter of right under Section 237(a) of the Judicial Code. But, regardless of that fact, the City filed a Petition for Rehearing in which it called said Court's attention to the error committed in its construction and application of said pretended ORDER, and to the points that it had based and made said decision to turn upon an issue that had not

been presented for decision and upon a statement of facts the opposite of what the record actually shows, and that, if said opinion were not withdrawn and the judgment of the trial court affirmed, the City would be deprived of its property without due process of law in violation of Article XIV of the United States Constitution. In this manner, not only was the validity of said pretended ORDER drawn in question as being repugnant to the United States Constitution for all of said reasons; but because the record has been properly brought to this Court on appeal under Section 237 (a) of the Judicial Code for the reason that the case involves the constitutionality of said ORDER, the inclusion of the other Federal constitutional questions in the assignments of error is proper, and they are rightfully before this Court for decision even if, standing alone, they otherwise might have been made the basis only of a writ of certiorari.

ANSWER TO STATEMENT OF THE CASE

Said statement first asserts for its premises, as bases for the arguments that follow, that:

> The City sued McGlone and the Casualty Company "on a statutory County Treasurer's Fidelity Bond given by McGlone as principal and the Casualty Company as surety (p. 2)***
>
> "It was in this capacity that the bond herein sued upon was given." (p. 3)

Our answers are:

(a) In executing the bond sued upon McGlone and the Company obligated themselves to the City, not merely as sureties, but as insurers of the performance of the following conditions by McGlone:

> "For paying over to his successor in office all such sums of money belonging to the City and County as shall be in his hands and to account for and turn over to his successor all monies deposited with him *for any cause whatsoever.*" (Section 105, 1927 Ed. of the City Charter; Appendix to Statement as to Jurisdiction, Exhibit C.)

Saint vs Wheeler, etc. Co., 95 Ala. 362; 36 A.S.R. 210
Empire State Surety Co. vs Lindenmeier, 54 colo. 497
Hurlburt vs Kephart, 50 Colo. 353
Curry vs Equitable Co., 27 Colo. App. 175, 186-188, 50 C. J. p. 80, 85, Sections 133-135.

As shown at length in our Statement as to Jurisdiction and on the face of the Motion to Dismiss herein, McGlone and the Company admitted and admit that these conditions were never performed and the decision of the Appellate Courts of Colorado have consistently followed and applied the "rule of strict accountability" in such cases, following that rule as it is stated in U. S. vs Prescott, 3 How., 578, ever since the question was first presented for decision in that state.

Gartley vs People, 24 Colo. 155
Gartley vs People, 28 Colo. 227
Babock vs the City of Rocky Ford, 25 Colo. App. 312
McClure vs La Plata County, 19 Colo. 122
Orman vs City of Pueblo, 8 Colo. 292
Patterson vs People, 98 Colo. 86
People vs Koenig, 99 Colo. 456

And in so doing said courts have held that the bond of such a treasurer "is the measure of his duties as treasurer and is the *contract* covering his duties and all those in his employ performing the duties of his office."

Gartley vs People, 24 Colo. 155, 163
Goss vs Board of Commissioners, 4 Colo. 468

(b) Instead of the bond sued on being a County Treasurer's bond, we respectfully submit it is as clearly as words could make it, the general official bond of McGlone as Manager of Revenue, as Ex Officio Treasurer of the City and County of Denver, a single body politic and corporate, to insure the faithful and prompt performance of his duties as treasurer of said City and County in the control, safekeeping and disbursement of ITS monies that "shall be in his hands for any cause whatsoever", whether in the performance of

his duties as City Treasurer, or when performing "the acts and duties required of county officers to be done by the constitution or by the general law as far as applicable" as provided by Section 2 of Article XX of the Colorado Constitution, Section 98, 1927 Ed. (Section 4) and Section 105, 1927 Ed. (Section 57) of the City Charter and by the words of said bond that are in literal compliance therewith.

As respects the functions and duties of such treasurers and the nature of the City as a single body corporate and politic, the case of Hilts vs Markey, 52 Colo. 382, cited in said Statement of the Case, has the following to say, at pages 384, 385 and 387:

> "In People v. Cassiday, 50 Colo. 503, at page 508, commenting on section 2 of article XX, which reads as follows:
>
> 'The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but every charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable,' the following was declared:
>
> 'This section does not imply that there is no county or county government within that territory; there is therein a county and a county government, just as both exist in other portions of the state. Section 2 not only does not, in fact, set aside governmental duties and functions as to state and county affairs in this territory, it does not even pretend to do so, and by no stretch of the imagination can it fairly be held to do so. Neither is there any other provision of article XX which does it. The duties are fixed, power which created them. Section 2 expressly absolutely fixed, until changed by the same

recognizes that such duties are in existence and must be discharged, and forthwith proceeds to provide and declare by whom they shall be performed.' "

"Within the consolidated municipality of 'The City and County of Denver' there are two governmental entities, a county with county duties, as provided by the general state law, and the consolidated municipality of the city and county of Denver, with duties wholly of a local character; all of the duties of both these governmental entities are to be done by a single set of municipal officers, certain of whom are designated by the charter to discharge duties and functions other than those of a municipal character, but still to be performed in that territory; the duties of state and county governmental import being fixed by the constitution and general laws, concerning which the people of 'The City and County of Denver' have no power to legislate, and those pertaining to the municipal government of 'The City and County of Denver' being fixed by the charter. The word 'county,' as used in the designation 'The City and County of Denver,' has no significance so far as county duties, as such, and the discharge of them, be concerned; it is merely a part of a name, used to identify the consolidated municipality known as 'The City and County of Denver.' With equal propriety, and doubtless much less confusion, that entity might have been designated 'The Municipality of Denver' or 'The Corporation of Denver.' The designation 'The City and County of Denver' means exactly the same as would the names 'The Municipality of Denver' or 'The Corporation of Denver.' Such a designation could and would refer, in the very nature of things, to the municipality as a city, that is, to local affairs and local government, and there could then have been no doubt or confusion about its meaning."

Said "Statement of the Case" further asserts the following as premises for the argument that follows:

"In addition thereto he had given a *special* bond as treasurer or custodian of the Water Works funds with reference to moneys in his possession belonging to the Board of Water Commissioners (of the City of Denver) upon which the Fidelity and Deposit Company of Maryland was the surety (the general bond is Exhibit A at R. fols. 227-231, and the special bond is Exhibit B, at R. fols. 231-240). • • •

"Also the Manager of Revenue is Ex-officio City Treasurer, and the Treasurer of the *Board of Water Commissioners*, as well as Treasurer of *other Departments* and agencies of the City. It was as Treasurer of the Board of Water Commissioners that this special bond (Exhibit B referred to above) was given." (Emphasis supplied)

Our answer is:

Instead of the *additional* bond that was given by McGlone and the Fidelity & Deposit Company of Maryland in accordance with the provision therefor contained in Section 297 B 1927 Ed. (Section 294 D of the Charter), (Appendix to Statement as to Jurisdiction, Exhibit C) being a *special* bond, it was executed to the City in accordance with that provision as an additional bond and is designated in the opinion of the Supreme Court herein as a "supplemental bond" which clearly it was, since that is exactly what such a bond is, according to such authorities as the following:

Searcy vs Cullman Co. 196 Ala. 287, 71 So. 664
State vs Sparks, 109 W. Va. 394, 155 S. E. 172
City of Cudahy vs Firer, 215 Wis. 607; 255 N. W. 904
Evans vs Illinois Surety Co., 220 Ill. App. 216

Holland as Governor vs American Surety Co. of New York, Fla. 6 So. 2d, 280, 140 A.L.R. 145, 50 C. J. 155, Section 255

Stearns Suretyship, p. 135, 5 Couch on Insurance, 4382, Note 23

Said Statement of the Case next asserts that:

"Under the Charter there was created a department or quasi-corporation known as the Board

of Water Commissioners. This Board operates as a unit, agency or corporation carrying on the proprietary function of operating the City's Water Plant and of furnishing the City, its inhabitants and others with water at rates, charges or rentals fixed by the Board. It even charges the City for water furnished to the City, just as to any other user. It operates with great independence of the City. Just as in a Public Utilities Corporation, the members of the Board constitute its Board of Directors; (p. 3). We answer as follows:

(a) We respectfully submit that the foregoing statement is but a mass of contradictory assertions which refute themselves for the following reasons:

While a municipal corporation such as the "Home Rule" City and County of Denver may for the conduct of its local and municipal matters create departments and agencies, it could not, if it would, create a quasi-corporation "known as the Board of Water Commissioners", which could operate "with great independence of the City", and whose members would "constitute the Board of Directors", because the creation of such a corporation is not a local or municipal matter within the jurisdiction of a municipality, but one of general concern that is within the exclusive jurisdiction of the Legislature of the state.

Colorado Springs vs Hydro-Elec. Co., 57 Colo. 169, 184, 185:

> "Counsel for defendant relies on San Francisco v. Spring Valley Water Works, 48 Cal. 493, to sustain its contention. But that case simply determines that a private corporation authorized to furnish water for the city was not thus endowed with municipal powers, that such a corporation must be organized under the general laws of the state, and it is not within the constitutional power of the legislature to confer municipal powers upon a private corporation.

> "While functions of the municipality, such as the erection and maintenance of public utilities, are not governmental in their nature, yet they are strictly municipal purposes, that is to say they are intended specially and peculiarly to promote the comfort, convenience, safety and happiness of the citizens of the municipality, though perhaps not essential to the welfare of the general public."

See also Northern Colo. Irrigation Co. vs Arapahoe County, 95 Colo. 555

Section 297 B, 1927 Ed. of the City Charter, from which said Board derives its whole existence and authority, expressly provides that:

> "On the second Monday in June 1919 and every two years thereafter there shall be appointed by the Mayor one or two commissioners, as the case may be, for terms of six years each, to succeed those whose terms expire at said times. Said commissioners shall each receive a salary of Six Hundred Dollars per annum, payable as other salaries are paid. Each commissioner shll take an oath and give a bond in the sum of $5,000, conditioned and to be approved as provided by the Charter for bonds of other officers."

We respectfully submit that it is, therefore, apparent that the members of said Board are officers of the City and not directors of a corporation of any kind or nature, but that said Board is a purely "administrative agency or instrument employed exclusively in the control and management of the City's "Water Works plant and system".

In re Senate Bill 12. Colo. 188, 190, 191, providing for a Board of Public Works of the City of Denver:

> "The Board in question is made a department or branch of the city government * * * It is like the Board of Health, Fire and other departments permanent in its nature, but charged with certain continuous duties and vested with certain perpetual

powers. These duties and powers are extensive and in some respects unusual, but they relate exclusively to municipal affairs and are essentially functions of the municipal government. The Board has no separate existence, office or authority. It is an administrative agency or instrument employed exclusively in the control and management of the city's improvements and other interests. In no material respects, save as to the scope and extent of those duties and powers, does it essentially differ from other departments, by means of which the public interests are promoted and the public health, peace and welfare protected within the municipality."

(b) If said Board of Water Commissioners were in any sense the Board of Directors of a quasi-corporation that "operates with great independence of the city", necessarily it would be a "special commission", such as is expressly prohibited by Section 35 of Article V. of the Colorado Constitution, which provides that, "The General Assembly shall not delegate to any special commission, private corporation or association any power to make, supervise or interfere with any muncipal improvement, money, property or effects, whether held in trust or otherwise, or to levy any taxes or perform any municipal function whatever."

Holyoke vs Smith, 75 Colo. 286, 294
Milheim vs Moffat Tunnel Imp. Dist., 72 Colo. 268

In re Senate Bill 12 Colo. 188, 190, 191

(c) The statement that: "It even charges the City for water furnished to the City, just as any other user", would seem to be an insinuation that said Water Board, which they say is an agency of the city, has autocratic authority over its own principal, when said Section 297 B of the Charter expressly provides as follows:

"The City and County of Denver shall annually pay into the Water Works *Fund* for all water supplied it, for all *public* purposes and the rates for the use of such water by the City and County shall not exceed the rates which were charged the City and

County of Denver for said purposes by the Denver Union Water Company for the years 1917 and 1918; provided that the City and County of Denver shall not be required to pay for water furnished it by the City Ditch for the irrigation of parks and parkways and for filling reservoirs." (Emphasis supplied)

Uhler vs City of Olympia 87 Wash. 1, 151 Pac. 117, 121, 122:

"The city in meeting functions that are called governmental is taking from the city as a proprietor a thing held in its proprietary capacity. Therefore the general fund of the city may be charged, and the special fund credited, with a reasonable charge for the water used when so provided by the ordinance. The city as a governmental entity stands in the same relation to the system as a private citizen who is patronizing it."

Otherwise the money of the private users would be taken for the benefit of all the inhabitants of the city for the conduct of their governmental functions.

Mills vs City of Elsinore 93 Calif. App 753, 270 Pac. 224, 231.

The next assertion contained in said statement is:

"It (the Board) elects or appoints its own officers and agents, except that the City Treasurer is Ex-officio its Treasurer; and it has exclusive jurisdiction over the City's Water Works, property *and funds*. The only restraint as to the expenditure of its funds is that disbursements made must be upon warrants drawn by the Board and audited by the City Auditor, except that disbursements made for the payment of principal and interest of Water Works Bonds need not be upon warrants so drawn and audited."

We answer as follows:

The only authority of said Board is derived from Section 297 B, 1927 Ed. of the City's Charter, which provides that:

> "The moneys in said Water Works Fund shall not be used other than for the management, operation and maintenance of said Water Works System and Plant, including additions, extensions and betterments, and for payment into the sinking fund for the payment of interest on and the payment and redemption of the bonds for the acquisition of a Water Works System and Plant when issued.";
>
> "The Board shall • • • daily turn over to the Treasurer of said CITY AND COUNTY all money received" • • • ;
>
> "Moneys shall be paid out of said fund only upon the warrants of the Board, audited by the Auditor of the City and County of Denver, EXCEPT as to bonds and the interest thereon, which the Treasurer (of the City and County) SHALL pay without such warrant or audit," (Ex. C, Appendix to Statement as to Jurisdiction).

It would, therefore, appear to be too plain for argument that the word EXCEPT means what it says, to wit, "without including" (23 C. J. 179); that the word SHALL means MUST and is mandatory and that in performing the duties of receiving all such moneys as they are turned over to him daily by the Board, of placing them in the sinking and interest funds as required by Section 113, 1927 Ed. (Section 236) of the Charter, (Appendix to Statement as to Jurisdiction, Exhibit C); of depositing them in the banks of Denver that will pay the highest interest as required by said Section 106; and paying the interest on the bonds that were authorized by said ordinances, and which, as well as the bonds themselves, provided for their payment at the option of the bondholders AT the Banking House of Kountze Brothers in New York City, as alleged in the answers that were filed herein, said Treasurer had to, and could only, act as Treasurer of said City and County with full, complete and exclusive authority,

and that legally he could not do otherwise without violating not only the foregoing, but all of the other Chapter provisions that are set frth in Exhibit C of the Appendix to our Statement as to Jurisdiction and the bond contract that is the subject of this action.

Such has been the ruling of the Supreme Court of Colorado as respects the duties, responsibilities and obligations of such officials; and such we respectfully submit is too apparent to afford excuses and assertions to the contrary, such as are contained in and quoted hereinbefore from the "Statement of the Case" made to support the Motion to Dismiss filed herein by McGlone and the Company.

Moulton vs. McLean, 5 Colo. App. 454
Todd vs Elkins, 101 Colo. 269, 277
In re House Resolutions 12 Colo. 395
Meads vs. U. S. 81 Fed. 684
Smith vs U. S., 170 U. S. 372, 383.

The next assertions made in said statement are that:

> "The City brought this action in its name for the Board of Water Commissioners against McGlone and his surety to recover on his bond given as County Treasurer (not upon his bond as Treasurer of the Board of Water Commissioners)".

Upon the foundation of such shifting sands they undertake to raise a structure which falls as rapidly as they endeavor to erect it. But as the record shows, the action was brought in the name of and for the City and County of Denver against McGlone as a Manager of Revenue, Ex officio Treasurer of said City and County, who had converted and failed to deliver to his successor in office, certain of the City's moneys that were in his hands, as it had to be, to be done at all, and it was brought under the direction and at the request of the Mayor of the City, in compliance with Charter requirements.

On page 5 of said statement the actual issues raised by the Plaintiffs in Error (Appellees) for decision, are stated by themselves, as follows:

> "The defense of McGlone and the Casualty Company was twofold. One was that liability, if any, was upon McGlone's *special* bond given as Treasurer of the Board of Water Commissioners, and not upon the bond sued upon in this case, given by him as County Treasurer; and the other defense was that he sent the *Board's* funds, lost in this case, to Kountze Bros. upon the *direction* and *command* of the Board, his superiors, who had the exclusive control and jurisdiction over such funds. The Colorado Supreme Court decided the case for the appellees on the *latter* defense, without mentioning the first, though the result upon the first, if decided, should have been the same." (Emphasis supplied).

As shown hereinbefore and as the opinion shows on its face, said Court did mention the first defense and in so doing designated the so-called special bond for what it was, a supplemental bond; and instead of deciding the case for the appellees on the last defense, stated in the above quotation, based and made the decision to turn upon a pretended ORDER of said Board, which it held to be a CONTRACT and "VALID OBLIGATION", to which it gave sanction, even to the extent of ruling and deciding that it bound both the City and McGlone in such a forceful manner that the opinion says:

> "The existing circumstances left no field of choice for defendant Treasurer—his not to make reply, his not to reason why, his but to obey."

So, following the lead of that clean statement of release, we repeat with all the emphasis at our command: "Justified by contract",—and respectfully submit that, regardless of their failure to even mention, and apparent endeavor to avoid, the fact that the first time any contract of any kind was even thought of by anyone connected with the case was when said opinion was rendered, and that Plaintiffs' in Error (Appellees') own statement constitutes a complete refutation of their own theory and definitely establishes the contention of the City that said decision was based and made to turn upon an issue that was never presented to said Court for decision, to wit, that said McGlone was "justified

by contract", instead of a mere "command or direction" of "his superiors."

In this manner they have simply caught themselves in their own trap, but apparently not being disposed to openly concede that the case was so decided, they have only made matters all the worse for themselves by the following misleading representations. Said statement says:

> "The trial was *principally* upon an agreed statement of facts. Appellant *did not deny* any of the facts presented by the statement. It admitted the truth of *all* thereof but objected to certain portions thereof as not being material or relevant and as being in part conclusions." (Emphasis supplied).

Our answers are:

(a) Said assertions are not true. Reference to folios 250-262, page 104 of the record will show that, as shown in our Statement as to Jurisdiction, there was no Agreed Statement of Facts; and instead of the City having "admitted the truth of all thereof", it not only refused to sign or agree to, but objected to, all of the paragraphs and parts of paragraphs of the proffered Statement of Facts that had any bearing upon the defenses that were *based* upon the so-called "command or direction" of the Water Board that consisted only of the three letters that said opinion first designated an ORDER that constituted a CONTRACT; but when the offer was made to prove those paragraphs and parts of paragraphs the attorney for the City distinctly stated, "We admit that the witnesses would so testify *without* admitting the truth of the statements and we object on the grounds of immateriality and irrelevancy and in part as mere conclusions." (Record p. 104, folio 262).

And it will be seen that apart from those paragraphs and parts of paragraphs, neither the answers of the defendants in the Trial Court nor their proffered stipulation contained any semblance of defense other than a denial of liability coupled with an admission of every fact essential to the recovery by the plaintiff of everything it asked for in the Trial Court, which it had.

(b) It will be noticed that the first of the sentences above quoted contains an indirect admission that the trial was not *altogether* upon an Agreed Statement of Facts. This much, at least, has finally been conceded; and it will be noticed that it differs very materially from such statements as that, "The facts, AGREED UPON BY STIPULATION BETWEEN THE PARTIES, include the following"; and "It is further stipulated that", that are made use of in the opinion herein and followed by quotations from the very paragraphs and parts of paragraphs the truth of which the City refused to admit and to the offer to prove which it objected on the grounds above stated.

We, therefore, respectfully submit that the foregoing indirect admission that the case was not wholly tried upon an Agreed Statement of Facts begins to shed at least a modicum of light upon the whole situation and carries with it something of the reason why the author of the opinion herein was led so far astray in his interpretations. Not only so, it affords at last an occasion for comment which otherwise we were not privileged to make, but had hoped for when our "Statement as to Jurisdiction" was launched at such length under such compelling circumstances, and the reasons for which may now be made apparent.

Said Statement of the Case says:

> "Notwithstanding this, appellant's counsel assert in their statement herein that the Justices of the Supreme Court of Colorado, who heard and determined this cause against the City en banc without dissent, did so 'upon an issue that was not presented for decision; and they make assertions with unnecessary and unbecoming vituperation and malignity, as we believe, against the Colorado Justices. We pass over counsel's slurs against the Colorado Supreme Court Justices as beneath our dignity to answer; and also because the Justices of the Colorado Supreme Court are above the requirement of defense."

That last clause is one which, at last, we can and do wholeheartedly concur in with Plaintiffs in Error (Appelles),

with the added statement that they are not only individuals for whom we entertain the most kindly feelings and highest regard in every sense of those words, but against whom we have not and would not under any circumstances, and did not in our opening Statement as to Jurisdiction, in any respect cast any slurs or even mention except in the concluding statement, which was made for the definite purpose of showing, as best we could, just why they were led into concurrence in such an erroneous decision: Absent the privilege of making the *abstract of record* that was prepared for them by the Plaintiffs in Error (Appelles) herein a part of the record on appeal. It is to be noticed that our "Statement as of Jurisdiction" was addressed exclusively to the opinion that was its subject, and that we endeavored to subject that, and that alone, to such a withering fire that no smoke would follow the trail of what we hoped might be a flame of light whose burning heat might be an inducement for the Plaintiffs in Error (Appellees) to make greater concessions even than they now have made in their "Statement of the Case", and at the time that concluding statement was added to our Statement as to Jurisdiction we happened to know just what that abstract of record, that was so prepared, actually stated; and that at least some of said Justices had not read over the record and were by no means averse to seeing the case carried to this Court on appeal. And we now not only reiterate our firm conviction that the associate Justices who concurred in said opinion did not read over the record in said cause, but that it is our firm belief that the abstract of record that was filed in the case by Plaintiffs in Error (Appellees) so far shortcircuited the attention of the author of the opinion that it was deflected from the supplemental abstract of record that was filed by the City and that for that reason alone said opinion was couched in language which followed said abstract of record and which shows so plainly on its face the grievous errors that were committed.

ARGUMENT

IN THE STATE COURT THERE WAS DRAWN IN QUESTION THE VALIDITY OF ANY STATUTE OF THE STATE OF COLORADO

Upon this proposition the argument of McGlone and the Company opens with the statement that:

> "As shown above the Appellant did not in either of the Colorado courts contend that the command or direction of the Board of Water Cmmissioners to its Treasurer was a 'statute' within the meaning of that word, as used in Section 237 A of the Judicial Code. (U.S.C.A. Title 28, Section 344A)."

Certainly not, for the reason that there was not and is not one scintilla of evidence in the record of any such "command or direction", as shown in detail in our Statement as to Jurisdiction and as the letters upon which Plaintiffs in Error rely altogether for proof of such a "command or direction" show on their faces. No such "command or direction" was pleaded as or in any respect claimed to be an ORDER of the Board of Water Commissioners that constituted a CONTRACT, and not until the opinion of the Supreme Court of Colorado was announced was there ever so much as a suggestion of the existence of anything of the kind. But the decision and judgment in this case were based and made to turn solely upon the existence of such an order or contract, in favor of the validity of which alone said Court decided the case, and which, to have any existence at all, necessarily required the exercise of legislative discretion on the part of said Board, as shown at length in our Statement as to Jurisdiction.

Bragg City Special Road Dist. vs Missouri, 323 Mo. 990, 66 A. L. R. 1053, 1059.

This, we respectfully submit, the record makes perfectly apparent in the following manner:

The complaint in this case is bottomed upon the general bond contract of McGlone that was executed in pursuance of,

in strict compliance with and with especial reference to Section 105 and all the other sections of the City Charter that are set forth by copy in Exhibit C of the Appendix to our Statement as to Jurisdiction, all of which entered into and constituted a part thereof; and no letters of its Secretary or of said Water Board, City Council or anyone else save the people by charter amendment could change the conditions of said bond, or discharge the liability thereon of the signers thereof, by assuming control of the City's moneys in the hands of its Treasurer, or by binding him and the City for the deposit thereof in any place or under any conditions.

Moulton vs McLean, 5 Colo. App. 454
Todd vs. Elkins, 101 Colo. 269, 277.
In re House Resolution 12 Colo. 395
Smith vs U. S., 170 U. S. 372, 382, 383
Choate vs Trapp, 224 U. S. 665, 671, 673
Meads vs U. S., 81 Fed. 684, 687

Because concurrently with the execution of said general bond it was either forever nothing more than "a mere scrap of paper", or the City became thereby vested with a definite right to have the conditions thereof performed in strict accordance with the letter thereof; and being a perfectly valid bond when executed, as it shows on its face it was and is, the City could not be deprived of that vested right without being deprived of its contract property right, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

Steamship Co. vs Joliffe, 69 U. S., 2 Wall. 450
Coombes vs. Getz, 285 U. S. 434, 52 S. Ct. 435
Forbes Pioneer Boat Line vs Board of Commissioners, 258 U. S. 338; 42 S. Ct. 325
Lynch vs. U. S., 54 292, 55 U. S. 571, 577, S. Ct. 840, 844
Murray vs Charleston, 96 U. S. 432
Choate vs Trapp, supra

In their answers Plaintiffs in Error (Appellees) admitted McGlone's failure to perform said conditions, but denied liability, and alleged as a defense that McGlone:

"sent the Board's (?) funds, lost in this case, to Kountze Brothers, upon the direction and command

> of the Board, his superiors, who had exclusive control and jurisdiction over such funds",

according to their own Statement of the Case that is now made in support of their Motion to Dismiss (Statement of the Case p. 5).

The only evidence they offered to support that defense was the three letters to which the opinion herein refers, copies of two of which are shown on the face thereof, and all of which are set forth in our Statement as to Jurisdiction as the "Statute of the State of Colorado, the Validity of which is Involved", and at pages 63 and 64 of the Record. To their admission in evidence the City objected on the grounds of their immateriality and irrelevancy (Record page 104, folio 262), and the Trial Court so held them to be in giving the judgment to the City for just what it asked for. Consequently when the Supreme Court of Colorado decided the case, it had presented to it for decision the issue as to whether McGlone was liable for his "failure to turn over to his successor in office" the moneys that were lost (which he admitted that he did not do) as the result of his having made the Kountze Brothers Banking House his depository thereof, in violation of the terms of his said bond and said Charter provisions, or whether he was relieved of liability for what he had done and failed to do, in violation of the terms of said bond and charter provision by a "command or direction" of said Board of Water Commissioners, acting simply as his "superior officers."

That was the issue actually presented for decision, that the Plaintiffs in Error (Appellees) now admit by their own Statement of the case as shown hereinbefore.

For the decision of said issue necessarily said Court had to consider and construe all of the terms of said bond contract, together with said letters, and could not possibly decide the issue so presented for decision without considering and construing them all together and, in connection therewith, also construing said Charter provisions, of which said Court was bound to take judicial notice, and all of which were before it and as an integral part of the contract, if any, so to be considered and construed, as shown hereinbefore. But, instead of de-

ciding the issues so presented to it for decision, said Court based its decision of the case upon an issue that was not presented to it for decision, and in so doing ruled that said letters were an ORDER of the Board of Water Commissioners; that said Board was McGlone's "superior officers", and that its said order constituted a contract "and valid obligation" in favor of the validity of which it decided, by ruling and holding that both the City and McGlone were bound thereby to the full extent that McGlone, as Treasurer, was placed in the position wherein there was "left no field of choice for defendant Treasurer—his not to make reply, his not to reason why, but to obey". Said order was so ruled to be a contract of such binding force that had said McGlone failed to transmit said moneys to Kountze Brothers he would indeed have breached the general bond contract that was the subject of the controversy itself. (See Opinion Appendix to our Statement as to Jurisdiction, Exhibit A).

It is next argued that:

> "Appellant has been unable and has failed to comply with Subdivision 1 of Rule 12 of the Rues of this Court providing—'*** The Statement shall refer distinctly to the statutory provision believed to sustain jurisdiction, (b) to the statute of the state * * * the validity of which is involved (giving the volume and page where the statute may be found in the official edition) setting out verbatim or appropriately summarizing its pertinent provisions.' "

If this calls for any answer at all, about all that can be said is that Plaintiffs in Error (Appellees) have not only overlooked the fact that the statute of the state "the validity of which is involved" is referred to distinctly and set out verbatim in our Statement as to Jurisdiction, that there is no Official Edition in the volume and page of which the statute may be found, and that this argument inferentially attributes to this Court the adoption of a rule that would be impossible of performance, in such case, regardless of the fact that the "volume and page * * in the official edition" mentioned parenthetically in said Rule is required for the Court's convenience only in cases where there are Official Editions to which the Court may be referred.

Finally, it is argued that:

> "In any event the said direction or command was not a 'statute'. It did not directly affect any part of the public to whom the Board offers water services or with whom it deals, as a city department, agency or corporation. It was simply an *administrative* matter *within the workings of the Board itself.*" (Emphasis supplied).

Our answer is, then, how could it possibly be a contract that would bind the City and to which the Supreme Court of Colorado could lend the sanction of that state for the purpose of depriving the City of its vested property rights in the bond contract sued upon in this action?

Certainly if the so-called "command or direction" "was simply an administrative matter within the working of the Board itself" it was not such a "mutual agreement between two or more competent parties for a valuable consideration touching on lawful subject matter," and, therefore, not an order that constituted a contract such as that to which the Supreme Court of Colorado has given that state's sanction.

Wherefore, according to the foregoing assertion, to which the Plaintiffs in Error (Appellees) are now committed, said Supreme Court did in reality base the decision of this case upon an asserted order of said Water Board that was ruled to be a contract, the existence of which said Plaintiffs in Error (Appellees) themselves never dreamed and for which, even now, they do not make any claim ever to have had any existence whatever.

As the last argument upon this proposition, Plaintiffs in Error (Appellees) say:

> "The record herein is wholly devoid of any showing that as specified in Appellant's Assignments of Error the decision of the Colorado Supreme Court was a suit 'where is drawn in question the validity of any statute on the ground of its being repugnant to the Constitution.'"

But the Supreme Court of Colorado did hold and rule that the letters which the opinion herein quotes, and to which it refers as "containing the contract arrangements already described", and which within themselves embrace everything that is contained in the record respecting any arrangements of any kind whatever, was a valid order of the Board of Water Commissioners that constituted a binding contract of the nature hereinbefore stated, and, to be such an order or contract at all, necessarily it had to be the result of and constitute an Act of the said Board that was legislative in character.

Bragg City Special Road Dist. vs Missouri, 323 Mo. 990, 66 A. L. R. 1053, 1057.

Such being the case, the record does show in the most emphatic manner that, as specified in Appellant's Assignments of Error, the decision of the Colorado Supreme Court was a suit "where is drawn in question the validity of any statute on the ground of its being repugnant to the Constitution", because the sum and substance of the whole situation, as shown by the record herein is as follows:

The Council of Denver enacted three ordinances, which were approved by the taxpaying electors, and authorized the issuance of certain bonds, which were made payable, and which showed on their faces that they were payable, at the option of the bondholders, AT Kountze Brothers Banking House in New York City.

On *August 3, 1927* Kountze Brothers addressed a letter to Hiram E. Hilts, Sec'y of the Board of Water Commissioners, in which they indicated a disposition "to have our firm named as *fiscal agents* for the *payment* of the interest on these bonds in New York", and stating that, "If funds to pay this interest are placed with us 15 days prior to the maturity of the coupons we will make no commission charge for paying these obligations". (Record page 65, folio 242).

Thereafter on *November 30, 1930,* the then Secretary of said Board addressed a letter to Kountze Brothers, in which he said that:

"We find that the funds to cover the interest coupons on the Denver Municipal Refunding Water Bonds, Series 1927, due December 1, have not been *forwarded* to you as per your letter of August 3, 1927, 15 days prior to the interest *paying* date.

We are sorry that this instalment was overlooked and will assure you that in the future the funds will be there in proper time."

(Record page 63, folio 240)

On the same date said Secretary addressed a letter to Clem W. Collins, the predecessor of McGlone as treasurer, saying:

"We are enclosing a copy of a letter from Kountze Brothers, dated August 3, 1927, relative to the *payment* of the interest on Denver Municipal Refunding Water Bonds, Series 1927, and also a copy of a letter we are this day writing to them.

Will you kindly be governed accordingly."

(Record page 64, folio 241).

Notwithstanding that Section 297B, 1927 Edition (Section 264 D) of the City Charter, from which the Board derives its only authority, expressly provides that "All action by the Board shall be taken by a majority of the Board and not otherwise", and that the auditor "shall sign and register all contracts", and there was not even an offer to prove that said letters to and from said Secretaries were either of them ever acted upon, by the Board, and the letters themselves constitute the only evidence that is contained in the record respecing any dealings of any kind by anyone with Kountze Brothers, other than the deposit of the City's money with them by its Treasurer, the opinion herein says:

"The record shows, however, that Denver entered into a *contract* with Kountze Bros. whereby the latter would act as *paying* agent IN New York City for Denver in respect to the three bond issues.

> The *consideration* for Kountze Bros. so acting was that Denver would DEPOSIT with them the sums necessary to pay the interest coupons * * *" (Emphasis supplied).

Said opinion further says that the letters to which it refers, and to which reference is had above, were written, and that the one written August 3, 1927 to Hiram E. Hilts was one "containing the contract arrangements already described"; that McGlone, "like his predecessor, made remittances to Kountze Brothers because he *found* express instructions from the Denver Board of Water Commissioners directing his office to make the remittances in accordance with the terms of an *agreement* made with said New York Banking House"; that: "In this case the City * * was under valid obligation to Kountze Bros. to make remittances to cover the estimated presentation of inerest coupons for payment IN New York City at least 15 days before the due date of the coupons"; that: "The Treasurer in turn was *not* merely *authorized* but directed by ordinance of the City Council to pay both the principal of the bonds and also the interest coupons (leaving out the provision of the ordinances that said bonds and coupons were to be made payable, and as shown on the face of the bonds themselves were made payable, at the option of the bondholders, *at* Kountze Bros. instead of IN New York City as the opinion says) and unlike other payments — — was expressly relieved of the necessity of obtaining warrants therefor. * * Finally the Treasurer was expressly directed by his superior officers, the Denver Board of Water Commissioners, to make remittances to Kountze Bros. in such manner as to comply with the City's contract with that banking house." (See opinion, Exhibit C, Appendix to our Statement as to Jurisdiction), all in total disregard of such charter provisions as Section 297B and Section 102 of the City Charter which do not merely authorize, but mandatorially require, that said Treasurer SHALL pay such interest coupons without warrant or order, and as shown at length hereinbefore, the Charter casts the whole responsibility for the control, safekeeping and disbursement of the City's money upon the Treasurer himself and expressly requires that such money shall be deposited in Denver banks that pay the highest interest and give depositary bonds for the security

of the City and County, executed by sureties other than the surety on the Treasurer's bond.

And Section 7, 1927 Ed. (Sec. 29) of the City Charter which expressly provides that:

> "All bonds, contracts or other instruments of writing requiring the assent of the City and County shall be subscribed by the Mayor, or Acting Mayor, as the case may be, under the seal of the City and County and attested by the Clerk".

> And the Supreme Court of the State of Colorado: "•••has consistently held that contracts executed by municipal corporations in which there was a failure to comply with the mandatory provision of the applicable statutes or charter are void."

> Swedlund vs Denver Bank, 108 Colo. 400, 408.

Within the time provided therein, and in accordance with Rules 48 and 49 of the Supreme Court of Colorado, which provide that:

> "A petition for rehearing • • • may be filed within fifteen days after the filing of the opinion of the Court and shall briefly state the points claimed to have been overlooked or misapprehended by the Court, with proper reference to the record and the authorities relied upon • • • . No answer will be permitted and no action will be taken save to grant or deny the rehearing,"

the City filed its petition for rehearing, which said petition not only specificall yand in detail called the Court's attention to just how it overlooked, misapprehended and misapplied the law and facts of the case in so construing said ordinances and letters, and in saying that McGlone had "made the remittances in accordance with the terms of an agreement made with the New York Banking House", but emphasized that by its decision in this case this Court had drafted for the City and County of Denver a contract, which would be void on

account of its ultra vires contrary to Section 106 of the Charter, in all the respects set forth in paragraph four of said petition, and in particular because: "the contract in this case, if any were atempted to be made, was made by either the Board of Water Commissioners or the City Council contrary to Charter directions", and all of said charter provisions were before the Court and of all of which it was bound to take judicial notice as hereinafter shown.

Said petition called the Court's attention to the fact that "the effect of this decision is to utterly repeal" said Section 106 "of the Denver City Charter • • • ", that "the Treasurer in his own discretion chose to violate Section 106, and if the present decision stands that section of the Denver City Charter has been repealed by City Ordinance and by correspondence between a city employee and Kountze Brothers"; that "no Ordinance or contract could be made by any city official nor can any rule of law properly be made by this Court operating to repeal the Charter adopted by the people of Denver to govern their Treasurer and his obligations;" that "the bond required by the Charter and actually executed by Plaintiff in Error herein was to insure the fulfillment of that positive obligation"; that "The Court has mistaken, overlooked and misapprehended the effect of the ordinances of the City and the directions of its Board of Water Commissioners regarding making funds available at Kountze Brothers for the payment of the obligations involved herein"; that "This Court has overlooked Section 297 B of the Charter of the City and County of Denver • • •, which clearly shows that the Treasurer is not subject to instructions from the Board of Water Commissioners", calling especial attention to the mandatory requirement of the exception contained in said Section "as to the bonds and the interest thereon which the Treasurer shall pay without such warrant or audit • • "; called the Court's attention to the fact that the Court had overlooked or misapprehended the nature of the Plaintiffs' in Error (Appellees') bond contract sued upon and Section 105 of the Charter of Denver, stating the particulars; and in its seventh paragraph said petition, with emphasis, called said Court's attention to the fact that it had overlooked or misapprehended the point, "That if the said opinion is not withdrawn and the judgment of the Trial Court affirmed, the City and County of Denver, Defendant in Error, will be deprived

of its property without due process of law, in violation of those provisions of Sec. 1 of Art. XIV of the Constitution of the United States that provides * * 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law'," for the resons set forth in our assignments of errors herein, among which was that "Any judgment entered upon or in pursuance of said opinion would deprive the Defendant in Error of its private contract property rights to recover against the said Continental Casualty Company as insurer and against said McGlone as principal, upon their respective promises to pay said Defendant in Error the sums of money belonging to it, which they admit were in the hands of and were deposited with the said McGlone during his term of office as Treasurer of said Defendant in Error, and for which he failed to account or pay or turn over to his successor in office."

And said petition concluded with the statement that any judgment entered upon or in pursuantance of said opinion would *for reasons hereinbefore stated* amount to a mere arbitrary and capricious exercise of power and would be in conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

For the foregoing reasons we respectfully submit that not only was "there drawn in question the validity of a statute of the State of Colorado", but that it was done in such an explicit and emphatic manner that the Supreme Court of Colorado could not escape notice of that fact in any other manner than by a total failure to read over the City's petition for rehearing, before denying it, and that said statute was drawn in question on the very definitely specified ground that, as construed and applied, the said decision would violate the United States Constitution, and clearly stated reasons that entitle the City to appeal as a matter of right; because, in so ruling and holding that said letters were an order of said Board acting in the capacity of McGlone's "superior officers" that con-

stituted a contract entered into by said Board in behalf of both the City and McGlone, whereby they were bound as stated in said opinion, we respectfully submit the Supreme Court of Colorado did exactly what the Supreme Court of Appeals of Virginia did when it gave the sanction of that state to a void instrument as a law of said state, in that said letters could not possibly be an order of said Board that constituted a contract, without at the same time time being an act legislative in character, as shown hereinbefore, and such being the case it was a "statute of any state" within the meaning of Section 237 A of the Judicial Code, because:

Williams vs. Bruffy, 96 U. S. 176:

> "Any enactment from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the clause cited relating to the jurisdiction of this court."

Ford vs. Surget, 97 U. S. 594, 602, 603
Eliza Stevens vs. Groffith, 111 U. S. 49
Ex parte Vir. 100, U. S. 346, 347
John P. King Co. vs. City Council of Augusta, 277 U. S. 100, 48 S. Ct. 489

Hamilton vs. Regents Univ. Calif. 293 U. S. 245, 55 S. Ct. 197, 202

Standard Computing Scale Co. vs. Farrell 249 U. S. 571, 577

Raymond vs. Chicago Traction Co., 207 U. S. 20, 35, 36

Miller vs. Schoene, 276 U. S. 272, 48 S. Ct. 246

Demorest vs. City Bank Farmers Trust Co., 321 U. S. 36, 64 S. Ct. 384

THERE WAS A SHOWING THAT THE STATE HAS DEPRIVED APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW

To support the contrary proposition the argument is advanced that:

> "Appellant contends that the state has deprived it of property without due process of law * * * for the alleged reason only, that its Supreme Court has erroneously decided this cause without reference to any Federal Constitutional question";

and that:

> "Appellant parenthetically states in its said petition for rehearing that the Court takes judical notice of this Charter provision. This statement is erroneous. The law is that *Colorado courts* do not take judicial notice of town or city ordinances *and Charters* and they must be pleaded and proven. (See Fay vs. Collins, 40 Colo. 262, 90 Pac. 912 and cases there cited)" (Emphasis supplied).

About the only comment that we know how to make upon these statements is that while it might seem possible to understand how a child could read the case cited and overlook the fact that it had to do only with an ordinance which, as a matter of course, has to be pleaded and proved, it is beyond our comprehension that experienced lawyers could be so negligent as to state to this Court that, "The law is that Colorado courts do not take judicial notice of town and city ordinances and *Charters,*" when it is so universally known that such Charters, and in particular the Charter of Denver, is taken judicial notice of by the courts of Colorado; and that, when it comes to the "statute of any state", since the days of Owings vs. Hull, 9 Peters 606, 625, it has been the announced rule of this Court and the lower Federal courts that such statutes are "to be taken judicial notice of, in the same manner as the laws of the United States are taken notice of by these courts."

Denver Tramway Co. vs. Carson, 21 Colo. App. 604, 617,618.

Shimmel vs. People, 108 Colo. 592, 600
Seattle etc. Ry. Co. of Seattle, 190 Fed. 75
Jackson vs. Denver etc. Co., Fed. 2d 457
L. & N. Ry. Co. vs. Palmes, 20 How. 227, 234, 15 L. Ed. 896

Surely Plaintiffs in Error (Appellees) must know that the Charter of the City of Denver is no mere statutory Charter enacted by the legislature of the state, but that it was, by the amendment of Article XX of the Colorado Constitution that was adopted in 1912, "ratified, affirmed and validated in each and every provision thereof" not in conflict with the article, and has been held by the Supreme Court of Colorado to have been thereby, "in substantial effect, written in the Constitution" itself.

Denver Telegraph Co., 67 Colo. 225, 234

So, basing our assertions upon the unambiguous words of Section 6 of Article XX of the Colorado Constitution and the decisions of its Supreme Court to which we have referred, we repeat, with emphasis, that the Colorado Courts do indeed take judicial notice of Charter provisions, and in particular that part of the Constitution of the State known as the Charter of the "Home Rule" City and County of Denver.

The proposition that:

> "Appellant contends that the state has deprived it of property without the due process of law * * for the alleged reason only that its Supreme Court has erroneously decided this cause without reference to any Federal Constitution question",

is one which we respectfully submit not only runs parallel to, but is equivalent of, the one last above discussed, in being altogether without foundation.

The proposition which Plaintiffs in Error (Appellees) have submitted for consideration is that there is "No showing that the state has deprived Appellant of any property without due process of law," but the seventh paragraph of the petition for rehearing, that was filed in the Supreme Court of Colorado (Record pp. 108-117), is, as shown hereinbefore, expressly based on that particular ground.

The question before the Court for decision at the pres-

ent time is whether our "Statement as to Jurisdiction" entitles us to an appeal as a matter of right, under Section 237 A of the Judical Code. We respectfully submit that that statement and the record herein show that the validity of the order of the Board of Water Commissioners that the Supreme Court of Colorado construed to be a contract, was inseparably connected with, and a part of, the contract so asserted and held valid by the opinion of said Supreme Court, because the validity of that contract could not be so sanctioned without considering and construing said Charter provisions and bonded contract sued upon. The question whether the bond contract was impaired and the City thereby deprived of its vested property rights thereunder by said order of the Board of Water Commissioners was, therefore, necessarily involved and was a Federal question without the consideration of which the decision could not have been made at all.

The consequence is, that this Federal question, which was first made an issue in the case by said opinion, appears on its face, and it was not necessary or essential that it should be specially set up in that Court at all in order to raise the question that the state has deprived Appellant of property without due process of law, because:

> "Wherever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by state legislation, which is sustained by the judgment of a state court, this court is authorized to interfere. Its jurisdiction, therefore, to examine such judgment cannot be defeated by showing that the record does not in direct terms refer to some constitutional provision, presented. The true judicial test is whether it appears that such question was decided adversely to the Federal right.
>
> The provision in that Constition, that no state shall pass a law imparing the obligation of contracts, is a limitation upon the taxing power of a state as well as upon all its legislation, whatever form it may assume. Therefore, a law changing the stipulations of a contract or relieving a debtor from a strict and literal compliance with its re-

quirements, enacted by a state in the exercise of that power, is unconstitutional and void."

Murray vs. Charleston, 96 U. S. 432
Under Section 237 A of the Judical Code

"It may be said to be the result of the rulings in this Court that if the Federal question appears in the record in the State Court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here."
Harding vs. Ill., 196 U. S. 78, 85, 86

Columbia Water Power Co., vs. Columbia S. R. Co., 172 U. S. 475 and cases cited on page 488.

We therefore, respectfully submit that the case is one wherein the question whether the state has deprived Appellant of its property without due process of law was clearly shown, because:

First, that question was necessarily considered and was the very question upon which the whole decision was dependant and appears upon the face of the opinion itself; and

Second, it was clearly and distinctly called to that Court's attention by the City's petition for rehearing.

And the case is, therefore, one of that class of cases: " • • • in which this Court has held that in determining whether a state law has impared a contract, it must decide for itself whether there was a contract and whether the law as enforced by the state court impairs it. It often happens that the law of a state constitutes a part of a contract and to make the constitutional inhibition effective, this court must exercise an independent judgment in deciding as to validity and construction of the law and the existence and terms of the contract."

Tidal Oil Co. vs. Flanagan, 263 U. S. 444, 44 S. Ct.197, 199

"Where it becomes necessary to consider whether a state is depriving, or attempting to

> deprive, *a litigant of property without due process* of law, in violation of the Fourteenth Amendment, and the question turns on the existance and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms."

Railway Commission vs. Eastern Texas Ry. Co., 264 U. S. 79, 44 S. Ct. 247

Forbes Pioneer Boat Line vs. County Commissioners, 258 U. S. 338, 42 S. Ct. 325

Home Insurance Co. vs. Dick, 281 U. S. 398, 50 S. Ct. 338

Municipal Investors Assoc. vs. City of Birmingham, 316 U. S. 153, 62 S. Ct. 975

Coppage vs. Kansas, 236 U. S. 1, 15

Fiske vs. Kansas, 274 U. S. 380, 47 S. Ct. 655

People ex rel Zimmerman, 278 U. S. 63, 49 S. Ct. 61

In its construction, application and enforcement of said pretended order of the Board of Water Commissioners the Supreme Court of Colorado has given the sanction of that state to said order as a law of said state.

At its first opportunity the City in its petition for rehearing distinctly and definitely drew in question the validity of said order as so construed and applied, and as shown hereinbefore that constitutional question is apparent on the face of said opinion itself. The record has been properly brought to this Court on appeal, under Section 237 A of the Judicial Code as Amended, because the case involves the constitutionality of said order which, as hereinbefore shown, is a "statute" of said state within the meaning of that section.

In its assignments of error the city has included some assignments which, if standing alone, otherwise might have been made the basis only of a writ of certiorari, but accompanying a record properly brought up on the ground that the case involves the constitutionality of the statute, said errors are properly assigned and call for decision.

Prudential Insurance Co. of America vs. Cheek, 259 U. S. 530, 42 S. Ct. 517

Brinkerhoff-Faris etc. Co. vs. Hill, 281 U. S. 673, 50 S. Ct. 451

Wherefore, for each and all of the foregoing reasons, we respectfully submit that the Motion to Dismiss filed herein should be denied.

Respectfully submitted,

MALCOLM LINDSEY,
THOMAS H. GIBSON,

Attorneys for City and County of Denver, Appellant.